

**TOXIC SUBSTANCES:
FEDERAL-PROVINCIAL CONTROL**

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ISSUE DEFINITION

Widespread public concern exists about the effect of toxic substances on human health and the environment. The St. Basile le Grand fire, the Mississauga train derailment, and other such incidents again focused public attention on this issue. Increasingly, people are turning to government to deal with their concerns and demanding that stringent standards be set and uniformly enforced across the country. A national poll conducted in July 1989 revealed that 82% of Canadians think that government should be doing more to protect the environment. Successive federal governments have been aware that the public expects them to take a leading role in this area and to ensure that the various provincial governments follow suit.

The control and management of toxic substances in Canada has not been assumed by any one level of government and requires the input of both the federal and provincial governments. It is essential, therefore, that efforts are coordinated and made as uniform as possible. The success of interjurisdictional efforts to control toxic substances ultimately depends upon the adequacy of standards throughout the country, the effectiveness of mechanisms to enforce those standards and the ability of the federal and provincial governments to coordinate their efforts in this regard.

BACKGROUND AND ANALYSIS

A. Control of Toxic Substances under the Canadian Constitution

Jurisdiction over environmental matters and the control of toxic substances in particular does not fall clearly under any of the powers assigned to either the federal or the provincial governments under the Canadian constitution. Neither the *Constitution Act, 1867* nor subsequent amendments mention the environment or toxic substances. Some aspects of the control of toxic substances have been regulated by the federal government; other aspects have fallen to the provinces; for yet other aspects, laws are overlapping, concurrent or joint.

Most often, the federal government has relied on its exclusive jurisdiction over navigation and shipping, sea coast and inland fisheries, the criminal law, interprovincial and international trade, and the residual power to make laws for the peace, order and good government of Canada (the p.o.g.g. power) as bases for legislation to control toxic substances. The provinces have relied on their power to legislate in relation to local works and undertakings, property and civil rights in the provinces, matters of a local or private nature within a province and lands, mines, minerals and royalties belonging to the provinces, among others.

The federal p.o.g.g. power has formed the constitutional framework for a number of federal environmental statutes. The courts have generally applied this power in the following circumstances: where a national emergency exists; where a situation or problem is not specifically dealt with in the constitution and is not of a local or private nature; and where the matter is of concern to the nation as a whole and cannot be effectively dealt with by the provinces.

The constitutional validity of national emission standards for secondary lead smelter emissions made pursuant to the federal *Clean Air Act* (now incorporated into the *Canadian Environmental Protection Act* (CEPA)) has been upheld on the basis of the p.o.g.g. power, the court having determined that the control of air quality transcends provincial

jurisdiction and is not a matter of local or private concern. Similarly, the Supreme Court of Canada in the landmark case of *R. v. Crown Zellerbach Canada Limited* (1988) applied the national concern doctrine of the p.o.g.g. power in holding that the prohibition against dumping without a permit found in section 4(1) of the federal *Ocean Dumping Control Act* (now incorporated into the *Canadian Environmental Protection Act* (CEPA)) and, hence, the control of marine pollution, is a valid federal responsibility. This decision may prove to support a broader federal authority for toxic substance regulation than has until now been asserted.

B. Legislation

Both the federal and provincial governments have enacted laws which deal with toxic substances. The principal federal statutes are the *Canadian Environmental Protection Act* (CEPA) which received Royal Assent on 28 June 1988 and was amended in 1989 (S.C. 1989, c. 9, in force 29 June 1989), the *Transportation of Dangerous Goods Act* (TDGA), proclaimed in force in 1980, the provisions of the *Fisheries Act* which deal with substances which are deleterious to fish and the *Motor Vehicle Safety Act*, pursuant to which motor vehicle emission standards are made.

The provinces have chosen a variety of means to deal with the control of toxic substances. Through environmental protection laws and other more specific statutes, they generally employ permits, licences, approvals and control orders to limit the discharge of toxic substances into the environment. In addition, the disposal and transportation of hazardous waste materials within a province is regulated.

A 1986 report by a federal task force on the management of chemicals noted that a proper management approach to chemicals cannot be effective without jurisdictional coordination and uniformity. It found that laws, programs, and guidelines often overlapped and that priorities conflicted.

The *Canadian Environmental Protection Act* is a comprehensive statute which replaces the federal *Environmental Contaminants Act* (ECA) and incorporates within its parameters provisions of other statutes relating to international air pollution (the *Clean Air Act*), ocean dumping (the

Ocean Dumping Control Act), and the manufacture and use of cleaning agents and water conditioners containing nutrients (the *Canada Water Act* - to be incorporated into the *Canadian Environmental Protection Act* (CEPA)).

The *Environmental Contaminants Act* was passed in 1975 largely as a response to a 1972 federal task force report which noted that federal legislation did nothing to prevent damage to the environment by screening substances which are known or potential environmental contaminants. In addition, the task force noted that existing federal and provincial laws were reactive rather than preventative and *ad hoc* in their approach.

Few substances were regulated under the ECA. The criteria for regulating were onerous and the process for adding a substance to the list of substances to be regulated was cumbersome. In particular, the requirement that consultations should take place with the provinces to determine whether a matter could be dealt with by provincial measures limited federal opportunities to regulate under the ECA.

CEPA had two main purposes: first the need to overhaul a statute (ECA) that had become outdated and no longer responded adequately to public needs and concerns; and second, the need to harmonize Canadian law with that of other nations. This legislation is largely based on the p.o.g.g. power and the federal government's authority over criminal law. The ability to deal with environmental quality, though not a clear or exclusive federal responsibility, has, through CEPA, been linked to human life and health and thus to the p.o.g.g. power. The references in CEPA to "the environment on which human life depends," are attempts to create the legal and constitutional framework for federal action in this area.

Toxic substances have a multi-stage life cycle. For the most part, the stages can be described as research and development, introduction of the substance, manufacturing, transportation, distribution, use and disposal. The level of responsibility of the federal and provincial governments varies along that life-cycle continuum. For example, the federal government might have principal responsibility for the areas of research and development and the introduction of such substances;

manufacturing, transportation and distribution might be shared responsibilities between the two levels of government; and use and disposal might be predominantly a provincial responsibility. The table on page 6 provides an overview of federal and provincial authority in this area.

In the first two years of implementation of CEPA, about 20,000 substances were placed on the Domestic Substances List, 44 substances were identified as requiring assessment and included in the Priority Substances List, and the Environmental Choice Program was established. The Environmental Choice Program adopts guidelines on "environmentally preferable" products; final guidelines are in place for at least 10 product categories.

C. The Political Arena

The legal framework for the control of toxic substances cannot be isolated from the political realities of environmental management. There has been a certain reluctance on the part of the federal government to intrude upon areas of provincial jurisdiction, and it has often been suggested that the provinces have enacted environmental protection laws to curb federal involvement in the area. In the past, reductions in the financial resources available at the federal level to deal with environmental issues have allowed the provinces greater scope for involvement.

These factors, among others, have produced a noticeable division of functions in the regulation of toxic substances in Canada. In essence, the federal government has maintained a leadership role in terms of setting and developing standards, guidelines and environmental quality objectives but has relegated actual regulation and enforcement to the provinces.

D. Federal-Provincial Co-operation

The interjurisdictional components of the regulation of toxic substances necessitate federal-provincial cooperation. Such cooperation can take place through both formal and informal mechanisms. Some of the mechanisms now employed are federal-provincial agreements and accords, advisory bodies, working-level task forces and committees and inter-ministerial coordinating bodies.

PROVINCIAL AND FEDERAL AUTHORITIES
FOR ENVIRONMENTAL PROTECTION*

ACTIVITY	INFORMATION GATHERING	ASSESSMENT	CONTROL
Manufacturing	F,P	F,P	F,P ²
Processing	F,P	F,P	F,P ²
Use	F,P	F,P	F,P ²
Import	F,P	F,P	F
Release from Commercial, Industrial and Governmental Activities ¹			
- spills	F,P	F,P	F,P
- abandonment	F,P	F,P	F,P
- releases to air, water, land	F,P	F,P	F,P
- disposal	F,P	F,P	F,P
Environmental Fate and Toxicology	F,P	F,P	

*F = Federal authority

*P = Provincial authority

1. Provincial legislation in general does not apply to federal facilities.
2. Potentially an indirect control, provincial authority in this area involves the assessment of manufacturing, processing and use activities for the purpose of potentially controlling the release, not the activity.

Source: Final Report of the *Environmental Contaminants Act*, Amendments, Consultative Committee (1986) Appendix 6

1. General Federal Accords with the Provinces

In the mid-1970s the federal government signed agreements for the protection and enhancement of environmental quality with seven of the ten provinces. (No agreements were reached with Newfoundland, Quebec or British Columbia). The objectives of these accords were to enhance the effectiveness of environmental control activities and to provide a framework for more specific agreements relating to particular problem areas.

Pursuant to these agreements, the provinces agreed to establish and enforce environmental requirements at least as stringent as federal requirements. For its part, the federal government agreed, after consultation with the provinces, to establish national ambient air and water quality objectives and to develop national baseline effluent and emission requirements and guidelines for specific industrial groups and specific pollutants.

A significant aspect of the agreements was the manner in which the enforcement of environmental standards was handled. The agreements accorded the primary responsibility for enforcement to the provinces while providing that federal authorities would undertake enforcement action at federal facilities, unless otherwise agreed upon, at the request of a province, or where a province failed to fulfill its obligations with respect to a matter of federal jurisdiction administered by it.

A 1984 Law Reform Commission of Canada draft paper on the prosecution of environmental offences suggested that encouraging the provincial governments to take a leading role in enforcement does not allow for a uniform approach since many of the provinces have differing enforcement schemes. The paper went on to conclude that the delegation of environmental enforcement authority constituted an abdication of responsibility on the part of the federal government and promoted inconsistencies in enforcement.

According to the most recent information obtained from officials of the Department of the Environment, the accords are no longer in force and efforts are now underway to negotiate new, broader-based agreements with the provinces.

2. Agreements Under CEPA

The environmental accords were not used to develop specific toxic substances control agreements with the provinces. CEPA, however, directly contemplates such agreements by allowing the Governor in Council, upon the recommendation of the Minister of the Environment, to recognize, by order, the primacy of provincial regulations relating to toxic substances where the Minister and the government of a province agree, among other things, that the province has in force provisions equivalent to the federal regulations applying to the toxic substance. The presence of a so-called "equivalency agreement" with a province means that the toxic substance to which it applies will be regulated under provincial law rather than under CEPA. Thus, the incentive for a province to enter into an equivalency agreement is the opportunity to regulate toxic substances under its own regulatory scheme.

According to the Enforcement and Compliance Policy published by Environment Canada in May 1988, the factors to establish equivalency will include: (a) equal level of control as sanctioned by law; (b) comparable compliance measurement techniques; (c) comparable penalties; (d) comparable enforcement policies and procedures that are consistent with the federal CEPA Enforcement and Compliance Policy; and (e) comparable rights of individuals resident in Canada to request investigation of a suspected offence and to receive a report of the findings.

Environment Canada is now negotiating with the provinces to settle how these factors would be used to define equivalency and to develop the procedures by which equivalency would be judged. To date, no equivalency agreements have been signed.

CEPA also provides for another form of agreement with the provinces respecting the administration of the Act. It would appear that these administrative agreements contemplate that a province will be responsible for the administration of the Act within its boundaries rather than the federal government.

The Minister is required to report annually to Parliament on the administration of the various federal-provincial agreements made under CEPA including those dealing with the enforcement of equivalent provincial requirements.

3. Federal-Provincial Advisory Committee

The Federal-Provincial Advisory Committee was established under CEPA to advise Ministers on the making of regulations relating to toxic substances. The Committee consists of representatives from the federal government, both from Environment Canada and Health and Welfare Canada, and from the governments of each of the provinces and territories. The Committee will ensure that consultation takes place on all management initiatives regarding toxic substances, that an effective framework for national action in protecting the environment from toxic substances is established, and that nationally consistent levels of environmental quality are achieved through national standards.

Regulations covered by the Committee's work will include those governing: the quantity of concentration of the substance that may be released into the environment; the places or areas where the substance may be released; the commercial, processing or manufacturing activity that may release the substance; the manner and the conditions under which the substance may be released, stored, handled or transported; or the packaging and labelling of the substance. Regulations at the federal level relating to the foregoing will not be made until after the federal-provincial advisory committee has been provided an opportunity to render its advice. Under the auspices of the committee, federal-provincial working groups have been established to deal with the issue of pulp and paper effluent, and the harmonization of controls for substances that deplete the ozone layer.

At this early stage, it is unclear what effect the federal-provincial advisory committee will have on the ability to regulate toxic substances in an effective and timely manner. Clearly, as CEPA states, the creation of this committee is intended to avoid conflict between, or duplication of, regulations. However, it remains to be seen how the committee will operate both in terms of the time it will take to reach a consensus on a regulatory initiative and the nature of the regulations that will emerge. The committee's participation in the regulatory process should make it easier to enter into equivalency agreements as the provinces will have had an opportunity to pre-approve certain federal regulations and adopt them as part of their own toxic substance regulatory regimes.

4. Coordination Among Environment Ministers

The Canadian Council of Ministers of the Environment (CCME) has played a significant role in the coordination of environmental initiatives at the ministerial level. Having emerged from the 1961 Resources for Tomorrow Conference as a forum for Canadian resource ministers, its mandate was expanded in 1971 to include environmental management. A great deal of CCME's work in the area of environmental policy is undertaken by groups of officials and staff from the member governments.

CCME has been active in the area of toxic substances. In 1979 it established a task force to review toxic substance controls and to provide advice on measures necessary to improve the existing legislation and to avoid duplication. Among the areas subject to review were manufacture, importation, transportation, storage, handling, use, waste disposal and emissions. Reporting in 1981, the task force recommended, among other things, that the federal, provincial and territorial government agencies responsible for legislation and programs carry out an in-depth analysis of legislation and related programs in order to strengthen the legislative base and the programs covering the introduction of toxic substances in Canada.

There is no indication that such a review has been systematically carried out by the relevant governments, although the enactment of CEPA at the federal level represents a significant development in the regulation of toxic substances.

In March 1990, the CCME adopted a restructuring proposal that is expected to be in place by March 1991. The Council seeks to become more streamlined by replacing five permanent advisory committees with two: an Environmental Protection Committee and a Strategic Planning Committee.

E. The Green Plan

On 11 December 1990, Environment Minister Robert de Cotret released the Green Plan, a five-year environmental "action plan" for Canada. The Green Plan was extended over six years as a result of the 26 February 1991 federal Budget. It includes a number of policies and

programs designed to deal with toxic substances. The initiatives announced in the Green Plan are to go into effect at different times within the next five years.

The Plan announced that the federal government had developed a Priority Substances List of 44 potentially hazardous substances which it will assess by 1994. The government will then report on the regulatory action determined to be necessary and this will be carried out under CEPA.

The Priority Substances List is to be reviewed by a multi-stakeholder panel, which will recommend whether other substances should be added to the List. The revised List will be published in 1994, and every three years thereafter. One hundred substances are expected to have been assessed and regulated through this process by the year 2000. Substances which are the subject of international trade are also being assessed by the Canadian government as part of an international effort.

The following regulations or other controls will be introduced over the next five years:

1. Federal regulations for the control of emissions of dioxins and furans from pulp and paper mills, and amendments to regulations under the *Fisheries Act* setting new limits on other pulp and paper industry effluents will be issued in 1991 and in force by 1994.
2. By 1994, reports will be released for major sources of toxic substances; they will deal with controls under consideration for smelters, petroleum refineries, chemical production facilities and power generation stations. Control option reports will also be released for sources of toxic Priority Substances in emissions from metal finishing and textile plants, metal mines and mills and chemical production and steel plants.
3. On a five-year cycle, regulations and other controls on toxic substances will be reviewed for their effectiveness.

A number of measures designed to increase the environmental awareness of individual Canadians are also included in the Plan, including some directed at helping Canadians eliminate the threat of toxic substances. These measures include a national data base for hazardous pollutants, which will be established by 1992, with reporting to start by 1994 and a further national data base for Canada's fisheries, to be developed by 1996. Also, new biotechnology regulations under CEPA will be developed and released by 1992.

The Green Plan also includes measures directed at identifying and addressing certain human health problems connected with environmental pollution. There will be new initiatives to improve the safety of our drinking water and further regulate ocean dumping, which may have a bearing on toxic substance controls. A new *Drinking Water Safety Act*, to be developed in partnership with the provinces, will be introduced in 1991, and it will deal with drinking water quality objectives and research. There will also be an investigation of the effects of airborne contaminants and climate change on human health. Other measures aimed at health effects in various specific parts of Canada were announced, including an information and awareness program.

A five-year Ocean Dumping Action Plan was announced, to go into effect immediately. Its elements include: improved regulations under CEPA to prohibit dumping of industrial wastes into the ocean and to better control the ocean disposal of dredged materials; augmented surveillance activities; a national research and information program, to be developed in cooperation with local and provincial governments and aimed at reducing the persistent discharge of debris into the marine environment; and, by the end of 1991, a discussion paper on a *Canada Oceans Act* to be released by the Minister of Fisheries and Oceans for public discussion. This discussion paper is to provide a legal basis for the protection of the marine environment, and designate protected marine areas.

PARLIAMENTARY ACTION

In 1976, the *Environmental Contaminants Act*, which had been passed by Parliament in 1975, was proclaimed in force. The Act was to regulate substances in Canada that constituted a significant danger to human health and the environment.

Bill C-74, the *Canadian Environmental Protection Act* was introduced in Parliament on 26 June 1987. The bill was to repeal the *Environmental Contaminants Act*, and incorporate within its parameters the *Ocean Dumping Control Act*, the *Clean Air Act* and certain provisions of the *Canada Water Act*.

The *Canadian Environmental Protection Act* was proclaimed in force on 30 June 1988.

CHRONOLOGY

- 1972 - Report of the federal Task Force on *Environmental Contaminants Legislation* recommended the need for a comprehensive environmental contaminants statute.
- 1975 - The federal government and seven of the ten provincial governments signed agreements for the protection of environmental quality.
- 1976 - The *Environmental Contaminants Act*, passed by the federal Parliament in 1975, was proclaimed in force.
- September 1985 - The federal Ministers of the Environment and of Health and Welfare established a multi-partite committee representing business, labour, environmental groups, and government to determine whether a consensus could be reached on proposed amendments to the *Environmental Contaminants Act*.
- September 1986 - A federal task force on the management of chemicals issued its report *From Cradle to Grave: A Management Approach to Chemicals*, in which it provided a framework for the responsible management of existing and future chemicals.
- October 1986 - The final report of the *Environmental Contaminants Act* Consultative Committee was issued. The report suggested a series of amendments to the ECA.
- December 1986 - Draft environmental protection legislation was made public by the federal Minister of the Environment.
- March 1987 - Representatives of industry, government, environmental groups and labour met to discuss concerns about the draft legislation.
- 26 June 1987 - Bill C-74, the *Canadian Environmental Protection Act* was introduced in the House of Commons.
- March 1988 - The federal government and the government of Nova Scotia signed an accord for the protection of the environment.
- May 1988 - The Department of the Environment issued an enforcement and compliance policy statement to be employed in connection with the *Canadian Environmental Protection Act*.
- 30 June 1988 - The *Canadian Environmental Protection Act* was proclaimed in force.
- 11 December 1990 - The federal Green Plan was released.

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